No. 45587-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

ROBERT BRUCE McKAY-ERSKINE,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT

The trial court violated the fundamental rule barring the admission of propensity evidence when it allowed the State to elicit testimony from witnesses to the effect that Robert McKay-Erskine had expressed a sexual interest in children years before the alleged incidents. Because the statements had no connection to the current charges or the alleged victim, they were relevant only to show a propensity to molest children and were therefore inadmissible. The statements were highly inflammatory and prejudicial, requiring reversal of the convictions.

In addition, the convictions must be reversed because the trial court unreasonably limited Mr. McKay-Erskine's ability to cross-examine one of his principal accusers with evidence that could have illuminated her biases and motives for the jury.

Finally, two of the conditions of community custody must be stricken because they are not crime-related.

B. ASSIGNMENTS OF ERROR

1. The trial court abused its discretion in admitting out-of-court statements Mr. McKay-Erskine allegedly made to friends expressing a sexual interest in children.

2. The trial court violated Mr. McKay-Erskine's constitutional right to confrontation by limiting his ability to cross-examine one of his accusers with evidence of her possible biases and motives.

3. Cumulative error denied Mr. McKay-Erskine a fair trial.

4. The condition of community custody prohibiting Mr. McKay-Erskine from having contact with physically or mentally vulnerable persons is not statutorily authorized because it is not crime-related.

5. The condition of community custody requiring Mr. McKay-Erskine to undergo a substance abuse evaluation and a mental health evaluation is not statutorily authorized because it is not crime-related.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. In a prosecution for child sexual abuse, ER 404(b) precludes the trial court from admitting evidence tending to show the defendant has a sexual interest in children if the evidence has no connection to the alleged victim or facts of the current charge. Did the trial court violate ER 404(b) by admitting out-of-court statements Mr. McKay-Erskine allegedly made to friends years earlier expressing a sexual interest in children, where the evidence had no connection to the alleged victim or facts of the current charges?

2. In a criminal trial, the constitutional right to confrontation guarantees a defendant the right to present evidence showing the possible biases and motives of the witnesses against him. Here, the trial court prohibited Mr. McKay-Erskine from presenting evidence suggesting that one of his principal accusers had an ulterior motive in testifying against him. Did the court's ruling violate his constitutional right to confront his accusers?

3. Did the above errors cumulatively deny Mr. McKay-Erskine a fair trial?

4. A trial court is statutorily authorized to impose "crime-related" conditions of community custody only if they are directly related to the circumstances of the crime. Did the trial court err in imposing conditions of community custody that (1) prohibit Mr. McKay-Erskine from having contact with physically or mentally vulnerable individuals, and (2) require him to undergo a substance abuse evaluation and a mental health evaluation, where those conditions have no relation to the circumstances of the current charges?

D. STATEMENT OF THE CASE

Robert McKay-Erskine met Pyxey Erskine-McKay about 18 years ago when the two were in their late teens or early twenties.

10/09/13RP 307-09, 312. At the time, they were staying at the home of a mutual friend, along with several other homeless people. 10/09/13RP 308. The people staying at the house—including Mr. McKay-Erskine and Ms. Erskine-McKay—were members of a group that called themselves "Ave Rats." 10/09/13RP 309-10. "Ave Rats" were homeless kids that hung out along University Way in Seattle. Id. There are more than 100 people in the group. They continue to act as a community and have common interests in science fiction conventions and role-playing games. Id. Over the years, they have moved from place to place and often help to raise each others' children. Id.

Mr. McKay-Erskine and Ms. Erskine-McKay became romantically involved and they married in 2011. 10/09/13RP 312, 317. They lived together with Ms. Erskine-McKay's three children from different fathers. 10/09/13RP 305. Her youngest child, A.B., was about six years old when the couple married. 10/09/13RP 317. The family also lived with Mr. McKay-Erskine's three children from a former partner. 10/09/13RP 318.

When the couple married, they were living on the property of Ms. Erskine-McKay's mother in Jefferson County, where the kids slept in tents outside. 10/09/13RP 317-18. Later they moved in with their

friend Rachel Charles and her children in Puyallup for a few months. 10/09/13RP 319-24. After that, they moved to a house in Tacoma. 10/09/13RP 325.

In March 2012, the couple's friend Camber Edwards moved into the Tacoma house with them. 10/14/13RP 74-75. By that time, the couple was not getting along and Mr. McKay-Erskine had moved out of the bedroom they shared. 10/14/13RP 76. Ms. Erskine-McKay was suspicious of Ms. Edwards from the moment she moved in and a hostile atmosphere pervaded in the house. 10/14/13RP 77-78, 83-84. Ms. Edwards and Mr. McKay-Erskine soon began a sexual relationship. 10/14/13RP 77.

On May 17, 2012, tensions came to a head and Mr. McKay-Erskine and Ms. Erskine-McKay had a physical altercation while the children were at school. 10/09/13RP 331; 10/14/13RP 79. Ms. Erskine-McKay found out that her husband and Ms. Edwards were having an affair and she was very upset about it. 10/09/13RP 358-59. Ms. Edwards called the police and Ms. Erskine-McKay thought she did so in order to get her into trouble. 10/09/13RP 332; 10/14/13RP 79. Mr. McKay-Erskine and Ms. Edwards moved out of the house soon afterward. 10/09/13RP 356.

Ms. Erskine-McKay's friends Falena Hasenbuhler and David Rosso, a married couple, moved into the Tacoma house to help her take care of the house and look after A.B. 10/09/13RP 335-37. Ms. Erskine-McKay has Asperger's syndrome and needed help with daily tasks and could not take care of her child on her own. 10/09/13RP 306, 351; 10/10/13RP 405-07, 451.

Ms. Hasenbuhler said that about two weeks after she moved in, A.B. started to ask her questions about sex. 10/10/13RP 409. Ms. Hasenbuhler thought the questions were normal but the child's knowledge seemed too detailed. 10/10/13RP 414. A.B. was very intelligent for her age and eager to please. 10/10/13RP 434-35. Because her mother was neglectful, she was clingy and in need of attention. 10/10/13RP 432, 464.

Ms. Hasenbuhler asked her husband to question A.B. because he is better at asking direct questions. 10/10/13RP 415. Mr. Rosso said that the next day, as he and A.B. were walking home from school, A.B. told him that Mr. McKay-Erskine had sexually abused her. 10/10/13RP 456. She said it had happened at both Ms. Charles's house in Puyallup and later at the house in Tacoma. 10/10/13RP 457. According to Ms. Hasenbuhler, A.B. then made similar disclosures to

her. 10/10/13RP 420. She said A.B. told her that Mr. McKay-Erskine had forced her to perform oral sex and had also rubbed her vagina with his penis and inserted his penis into her vagina. 10/10/13RP 420-21.

Ms. Hasenbuhler and Mr. Rosso told Ms. Erskine-McKay what A.B. had said, and she told them to take the girl to talk to the school counselor. 10/09/13RP 339. A.B. talked to the counselor, who reported the allegations to CPS. 376. Ms. Erskine-McKay called the police. 10/09/13RP 341.

A.B. then made similar allegations to a DSHS social worker and a police forensic interviewer. 10/09/13RP 386-89. A physical exam revealed no signs of abuse. 10/10/13RP 495.

Mr. McKay-Erskine was charged with three counts of rape of a child in the first degree, RCW 9A.44.073, and two counts of child molestation in the first degree, RCW 9A.44.083.[1] CP 1-3.

Prior to trial, the State moved to admit out-of-court statements that Mr. McKay-Erskine allegedly made in front of his friends Katherine Lavergne and Rachel Charles several years earlier, expressing a sexual interest in children. 9/26/13RP 23. The trial court

[1] For all five counts, the State charged the statutory aggravator that Mr. McKay-Erskine used his position of trust, confidence or fiduciary responsibility to facilitate commission of the crime. RCW 9.94A.535(3)(n). CP 1-3.

granted the motion, ruling the statements were admissible under ER 404(b) as evidence of motive and intent. 9/26/13RP 35-36.

Thus, at the jury trial, Ms. Lavergne testified that while she was living with Mr. McKay-Erskine in the summer of 2005, six years before the alleged events of the current case, he said to her "that the thought of putting his penis in a child's mouth without any teeth sounded enticing because the child would treat it as if it were a nipple and suck and chew." 10/14/13RP 9. She also said that he told her several times that "[a] girl's first sexual experience should be with her father because no one can love them as much as their father." 10/14/13RP 10, 15. Rachel Charles testified she was present, with Ms. Lavergne, when Mr. McKay-Erskine made a comment about how a girl's first sexual experience should be with her father. 10/14/13RP 26.

During trial, defense counsel moved to admit evidence suggesting that Ms. Erskine-McKay was motivated by revenge to accuse Mr. McKay-Erskine. 10/14/13RP 44. Counsel asserted that, around the time the charges were filed, Ms. Erskine-McKay threatened Mr. Erskine-McKay's new girlfriend, Ms. Edwards, and said to her, "once I am done with the defendant, I am going to come after you."

10/14/13RP 44-46. The court ruled the evidence was inadmissible hearsay. 10/14/13RP 46-47.

Ms. Erskine-McKay testified that Mr. McKay-Erskine's relationship with A.B. seemed normal and A.B. seemed to trust him. 10/09/13RP 324, 335. She did not notice anything about their relationship to cause concern. 10/09/13RP 360. Ms. Charles similarly testified she never noticed anything suspicious between Mr. McKay-Erskine and A.B. while they were living at her house. 10/14/13RP 32.

The jury found Mr. McKay-Erskine guilty of each count as charged. CP 94-98. The jury also answered yes on the special verdict forms regarding the aggravator, finding Mr. McKay-Erskine used his position of trust to facilitate commission of the crime. CP 99-103.

At sentencing, the State requested an exceptional sentence based on the jury's finding regarding the aggravator. 11/15/13RP 782-83. Defense counsel objected, arguing an exceptional sentence was not warranted because an abuse of trust is inherent in the crime. 11/15/13RP 785. The court denied the State's request for an exceptional sentence. CP 108-21; 11/15/13RP 787.

E. ARGUMENT

1. The trial court violated the fundamental rule barring propensity evidence when it admitted statements Mr. McKay-Erskine allegedly made several years earlier expressing a sexual interest in children because those statements were relevant only to show a propensity to commit the crimes

The trial court admitted statements that Mr. McKay-Erskine allegedly made to friends several years before the events in this case, that "the thought of putting his penis in a child's mouth without any teeth sounded enticing," and that "[a] girl's first sexual experience should be with her father." 10/14/13RP 9-10, 15, 26. The court admitted the statements under ER 404(b) as evidence of motive and intent. 9/26/13RP 35-36. But the evidence was relevant to motive and intent only under a theory of propensity. That is, the only relevance of the evidence was to suggest that because Mr. McKay-Erskine expressed a sexual interest in children in the past, he must have had a similar interest in the present and was therefore more likely to have committed the current crimes. Because evidence is not admissible if its only relevance is to show a defendant's propensity to commit the crime, the trial court's ruling was in error.

a. Evidence of a defendant's prior bad acts is admissible at trial only if it is logically relevant to a material issue through a theory other than propensity

Evidence of a defendant's "other crimes, wrongs or acts" is not admissible to show that he likely committed the crime charged, that he acted in conformity with his other acts, or that he had a propensity to commit the current crime. ER 404(b); State v. Fuller, 169 Wn. App. 797, 829, 282 P.3d 126 (2012), review denied, 176 Wn.2d 1006, 297 P.3d 68 (2013). Such evidence may be admissible for another purpose, including proof of motive, opportunity, intent, preparation, plan, knowledge, or identity. ER 404(b).

Other act evidence is admissible only if it is logically relevant to a material issue other than propensity. State v. Saltarelli, 98 Wn.2d 358, 361-62, 655 P.2d 697 (1982). If the evidence is admitted for another purpose, the trial court must identify that purpose and determine whether the evidence is relevant and necessary to prove an essential ingredient of the crime charged. State v. Powell, 126 Wn.2d 244, 258-59, 893 P.2d 615 (1995). Evidence is relevant and necessary if the purpose of admitting the evidence is of consequence to the action and makes the existence of the identified fact more probable. Id.

The probative value of the evidence must outweigh its potential for prejudice. Saltarelli, 98 Wn.2d at 362. "A careful and methodical consideration of relevance, and an intelligent weighing of potential prejudice against probative value is particularly important in sex cases, where the prejudice potential of prior acts is at its highest." Id. at 363-64.

Even if the court identifies a proper purpose for admitting the evidence, that is not a "magic password[] whose mere incantation will open wide the courtroom doors to whatever evidence may be offered in [its] name." Id. at 364 (internal quotation marks and citation omitted). The "other purposes" listed in ER 404(b) for which other act evidence may be admitted are not exceptions to the categorical bar on propensity evidence. State v. Gresham, 173 Wn.2d 405, 420-21, 269 P.3d 207 (2012). In other words, the trial court may not admit other act evidence to prove "motive," for example, if the only way the evidence is relevant to the issue of motive is by showing the defendant's character and action in conformity with that character. Id.

Thus, "[i]n no case, . . . regardless of its relevance or probativeness, may [other act] evidence be admitted to prove the character of the accused in order to show he acted in conformity

therewith." Saltarelli, 98 Wn.2d at 361-62. The rule is based on the fundamental notion that a defendant must be tried only for the offense charged. State v. Sutherby, 165 Wn.2d 870, 886-87, 204 P.3d 916 (2009).

Other misconduct evidence is presumed inadmissible and the court must resolve any doubt as to whether to admit the evidence in the defendant's favor. Fuller, 169 Wn. App. at 829. A trial court's interpretation of ER 404(b) is reviewed de novo as a matter of law. State v. Fisher, 165 Wn.2d 727, 745, 202 P.3d 937 (2009). If the trial court interprets ER 404(b) correctly, the Court reviews the trial court's decision to admit misconduct evidence for an abuse of discretion. Id. A trial court abuses its discretion if it fails to abide by the rule's requirements. Id.

b. Evidence of a defendant's lustful disposition toward children is not admissible in a prosecution for child sexual abuse unless the evidence shows a lustful disposition toward the alleged victim of the current crime

Mr. McKay-Erskine allegedly made the statements at issue in 2005, at least six years before the alleged events underlying the current charges. 10/14/13RP 9. The statements do not express a lustful disposition toward A.B., the alleged victim of the current charges.

Because the only relevance of the statements was to show that Mr. McKay-Erskine had a sexual interest in children in general, they were inadmissible propensity evidence.

Washington courts recognize that a great potential for unfair prejudice arises when evidence is admitted in a prosecution for a sex offense which tends to show the defendant has a general "lustful disposition" or an unusual sexual proclivity. Such evidence has a great potential for unfair prejudice and confusion of the issues because "[o]nce the accused has been characterized as a person of abnormal bent, driven by biological inclination, it seems relatively easy to arrive at the conclusion that he must be guilty, he could not help but be otherwise." Saltarelli, 98 Wn.2d at 363-64 (internal quotation marks and citation omitted).

Thus, in State v. Coe, 101 Wn.2d 772, 779-81, 684 P.2d 668 (1984), a prosecution for first degree rape, the Washington Supreme Court held that the trial court abused its discretion in allowing Coe to be cross-examined about a novel he had worked on that described sexual activities. The implication of the cross-examination was that the writings showed a lustful disposition on Coe's part, which had no bearing on any element of the charges. The court recognized that "[t]he

evidence of Coe's sexually oriented writings was inflammatory on its face and carried with it a high probability of prejudice to his right to a fair trial." Id. at 780-81.

Similarly, evidence that a defendant viewed child pornography on an unrelated occasion is not admissible in a prosecution for a child sex offense because such evidence is generally relevant only for the improper purpose of showing the defendant's lustful disposition toward children. See State v. Sutherby, 165 Wn.2d 870, 884-86, 204 P.3d 916 (2009) (evidence that defendant possessed child pornography on unrelated occasion would not be cross-admissible in separate trial on charges of child rape and child molestation because "the evidence would merely show Sutherby's predisposition toward molesting children and is subject to exclusion under ER 404(b)"); State v. Medcalf, 58 Wn. App. 817, 823, 795 P.2d 158 (1990) (evidence that defendant possessed X-rated videotape cassettes with children's film titles on them was inadmissible in prosecution for second degree statutory rape because there was no evidence that the alleged victim ever watched the movies); State v. Bush, 164 N.C. App. 254, 261, 595 S.E.2d 715 (2004) (evidence that Bush owned and watched pornographic videos of young women having sex was not admissible at

trial on a charge of first degree sexual assault of a child because there was no evidence that Bush provided pornographic videotapes to the child or employed the tapes to seduce her; "[a]bsent proof that the tapes were so utilized, such evidence, so tenuously related to the crime charged, impermissibly injected defendant's character into the case to raise the question of whether defendant acted in conformity therewith at the times in question.").

Historically, evidence of a defendant's "lustful disposition" has been admissible in Washington only to show a lustful disposition toward the complaining witness. See, e.g., State v. Crowder, 119 Wash. 450, 451-52, 205 P. 850 (1922) (prior acts of sexual intercourse between parties admissible in rape prosecution to show lustful disposition of defendant toward complaining witness). Critically, the evidence must show a sexual desire for the particular victim. State v. Ray, 116 Wn.2d 531, 547, 806 P.2d 1220 (1991). Such evidence is arguably relevant to a legitimate issue because it is not offered to show a general propensity to commit sexual crimes, but to demonstrate the nature of the defendant's relationship to and feelings toward a specific individual, and is probative of the defendant's motivation and intent in subsequent situations. State v. Cox, 781 N.W.2d 757, 768 (Iowa 2010).

Here, Mr. McKay-Erskine's statements expressed a lustful disposition toward children in general and not toward the complaining witness in particular. Thus, they were relevant only to show that he was predisposed to molest children. The statements were therefore inadmissible under ER 404(b).

c. The evidence was not admissible to prove intent because intent was not a material issue and the evidence was relevant to show intent only under a theory of propensity

One of the purposes the trial court identified for admitting the evidence was to prove intent. 9/26/13RP 35-36. But the evidence was not admissible for that purpose because intent was not a material issue in the case and the evidence was relevant to prove intent only under a theory of propensity.

Prior misconduct evidence is necessary and admissible to prove intent only when intent is at issue or when proof of the doing of the charged act does not itself conclusively establish intent. Powell, 126 Wn.2d at 262. Otherwise, the intent exception would swallow the rule. Id. In Powell, for example, evidence of prior disputes between Powell and his wife was not admissible to prove he had a present intent to kill her because proof of the act of manual strangulation was itself

sufficient to establish an intent to kill. Id. In other words, "intent [wa]s implicit in the doing of the act." Id.

When the charge is rape, evidence of prior bad acts may be admissible to rebut a claim that the current act was done with innocent intent. Saltarelli, 98 Wn.2d at 365-66. But where only the doing of the act is disputed, there can be no real question as to intent. Id. In Saltarelli, a prosecution for rape, Saltarelli admitted to having sexual intercourse but argued the victim consented. Id. Because "intent was not an essential point which the state was required to establish," evidence that Saltarelli tried to rape a different woman on a prior occasion was inadmissible to prove intent. Id.

Similarly, when the charge is child molestation, intent is not at issue if the defendant denies touching the "sexual or intimate" parts of the alleged victim.[2] See State v. Ramirez, 46 Wn. App. 223, 227, 730 P.2d 98 (1986). In Ramirez, the defendant was charged with indecent liberties and denied touching the "sexual or intimate parts" of the girl. Id. at 225. Therefore, intent was not at issue because "the mere doing of the act conclusively demonstrates the accompanying criminal intent.

[2] To prove child molestation, the State must prove the defendant touched the child's "sexual or other intimate parts . . . for the purpose of gratifying sexual desire of either party or a third party." RCW 9A.44.010(2); RCW 9A.44.083.

Here, once the act of touching is proven, it follows that the defendant touched for purposes of sexual gratification." Id. at 227. Therefore, evidence that Ramirez had fondled a different girl on an unrelated occasion was not admissible to prove he intended to have "sexual contact" with the alleged victim of the current charge. Id. at 226-27; ER 404(b).

Here, Mr. McKay-Erskine was charged with rape of a child and child molestation. CP 1-3. He did not claim he touched the child innocently but instead denied doing the acts. Therefore, intent was not an essential point the State was required to prove. Saltarelli, 98 Wn.2d at 365-66; Ramirez, 46 Wn. App. at 227. The other act evidence was not admissible to prove intent.

Even if intent were at issue, Mr. McKay-Erskine's prior statements would not be admissible to prove intent because they were relevant for that purpose only under a theory of propensity. "When the State offers evidence of prior acts to demonstrate intent, there must be a logical theory, *other than propensity*, demonstrating how the prior acts connect to the intent required to commit the charged offense." State v. Wade, 98 Wn. App. 328, 334-35, 989 P.2d 576 (1999). There must be an intermediate step in the inferential process that does not turn on

propensity. Id. The jury may not be permitted to infer that because the defendant had a particular intent on a prior occasion, he probably had the same intent in performing the current act. Id. "If prior bad acts establish intent in this manner, a defendant may be convicted on mere propensity to act rather than on the merits of the current case." Id.

In Wade, the defendant was charged with possession of cocaine with intent to deliver. Id. at 331. At trial, the State presented evidence that he had sold cocaine before in order to prove he had the intent to deliver on the present occasion. Id. at 332. The Court held the evidence was inadmissible because it invited the jury to infer that because Wade had the intent to distribute drugs previously, he must have possessed the same intent on the current occasion. Id. at 336-37 (citing ER 404(b)). Because there was no connection between the prior acts and the current offense, "[s]uch evidence and inference merely establish Wade's propensity to commit drug sale offenses." Id. at 337.

As in Wade, there was no connection between Mr. McKay-Erskine's prior statements and the current charges. Instead, the evidence invited the jury to conclude that because Mr. McKay-Erskine expressed a sexual interest in children years before, he must have intended to abuse the child on the present occasion. But that is just the

inference that ER 404(b) forbids. The court therefore erred in concluding the evidence was admissible to prove intent.

d. Similarly, the evidence was not admissible to prove motive because the only relevance of the evidence to motive was under a theory of propensity

Other act evidence may be admissible in some cases to prove motive. ER 404(b). "Motive" is "'[a]n inducement, or that which leads or tempts the mind to indulge [in] a criminal act.'" State v. Tharp, 96 Wn.2d 591, 597, 637 P.2d 961 (1981) (quoting Black's Law Dictionary 1164 (4th rev. ed. 1968)). Motive goes beyond gain and can demonstrate an impulse, desire, or any other moving power which causes an individual to act. Powell, 126 Wn.2d at 259.

Generally, the State may not attempt to prove motive through a defendant's prior bad acts. As with intent, there must be some connection linking the prior act with the current crime. In Saltarelli, for instance, the court held that evidence of the defendant's prior assault was not admissible to prove motive because there was no showing that the prior assault was a "motive or inducement for defendant's rape of a different woman almost 5 years later." Saltarelli, 98 Wn.2d at 365.

Similarly, in State v. Hieb, a prosecution for murder, evidence of the defendant's prior assaults on the victim and her sister were not

admissible to prove motive because there was no showing that the prior assaults were an inducement for Hieb's later assault on the victim. State v. Hieb, 39 Wn. App. 273, 283, 693 P.2d 145 (1984), rev'd on other grounds, 107 Wn.2d 97, 727 P.2d 239 (1986). For instance, there was no contention that the last assault was carried out in order to conceal the prior crimes. Id. Thus, "[t]he earlier assaults had no logical relevance to Hieb's motive for the last assault." Id.

In the absence of an explanation of how the prior conduct served as a motive or inducement for the current crime, the prior act evidence is inadmissible to prove motive. Saltarelli, 98 Wn.2d at 365. That is because the only relevance of the evidence is to show a propensity to commit the current crime, which is "precisely forbidden by ER 404(b)." Id.

Here, there is no showing of how Mr. McKay-Erskine's prior statements served as a motive or inducement for the current alleged crimes. There is no contention, for example, that Mr. McKay-Erskine committed the crimes in order to cover up the prior statements. Instead, the only relevance of the evidence was to suggest that Mr. McKay-Erskine must have been motivated to commit the crimes because he expressed an interest in having sexual contact with a child

on a prior occasion. But again, that is just the inference that ER 404(b) forbids. The trial court erred in admitting the evidence to prove motive.

e. Because the erroneously admitted evidence was highly inflammatory and unduly prejudicial, the convictions must be reversed

The improperly admitted evidence of Mr. McKay-Erskine's prior statements expressing a sexual interest in children was highly inflammatory and likely created a strong impression on the jury. The evidence characterized Mr. McKay-Erskine as "a person of abnormal bent, driven by biological inclination," and thus the jury likely concluded based on that evidence alone, "that he must be guilty, he could not help but be otherwise." Saltarelli, 98 Wn.2d at 363-64.

The erroneous admission of evidence in violation of ER 404(b) requires reversal if, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred. Gresham, 173 Wn.2d at 433. Evidence of other sexual misconduct is particularly inflammatory and prejudicial in a prosecution for a sex offense. The Washington Supreme Court has not hesitated to reverse a sex offense conviction where evidence of other sexual misconduct was

erroneously admitted at trial. See, e.g., Gresham, 173 Wn. 2d at 433-34; Sutherby, 165 Wn.2d at 887; Saltarelli, 98 Wn.2d at 367.

In Gresham, a prosecution for child molestation, the trial court erroneously admitted evidence that the defendant had previously molested another child. Gresham, 173 Wn.2d 405. The untainted evidence consisted of the alleged victim's testimony that Gresham molested her, her parents' corroboration that he had the opportunity to do so, and the investigating officer's testimony. Id. at 433-34. The Supreme Court held that, although this evidence was sufficient for the jury to convict, there was nonetheless a reasonable probability that absent the highly prejudicial other misconduct evidence, the jury's verdict would have been materially affected. Id.

In Sutherby, the defendant was convicted of child rape and child molestation for abusing his granddaughter. Sutherby, 165 Wn.2d at 874-85. He was also convicted of possession of child pornography for possessing images of children unrelated to his granddaughter. The Supreme Court held that defense counsel was ineffective for failing to move to sever the rape and molestation counts from the child pornography counts. Id. at 884-87. Counsel's ineffective assistance required reversal because, had the charges been severed and the

evidence of child pornography not been admitted at a separate trial on the rape and molestation counts, there was a reasonable probability that the outcome of that separate trial would have been different. Id. at 887; see also Saltarelli, 98 Wn.2d at 367 (conviction for first degree rape reversed where trial court erroneously admitted evidence of defendant's prior sexual assault against a different woman).

Just as in Gresham, Sutherby, and Saltarelli, the erroneous admission of evidence of other sexual misconduct was not harmless in this case. The content and tone of the statements that Mr. McKay-Erskine allegedly made in 2005 were highly inflammatory. The statements portrayed Mr. McKay-Erskine as an unusual person with particularly odious predilections. They likely offended every member of the jury and predisposed them to judge him harshly. It is unlikely that the jury was able to put the statements out of their minds or enter a verdict that was unaffected by the erroneously admitted evidence. Thus, there is a reasonable probability that, absent the improper evidence, the outcome of the trial would have been materially affected. The remaining, untainted evidence consisted principally of A.B.'s testimony and hearsay statements which were merely repetitive. If the jury had any doubts about the child's credibility, the propensity

evidence suggesting Mr. McKay-Erskine had a predisposition to molest children likely influenced the jury to resolve those doubts against him. The erroneous admission of the evidence in violation of ER 404(b) was not harmless and the convictions must be reversed.

2. The trial court's refusal to allow Ms. Edwards to testify about Ms. Erskine-McKay's out-of-court threat directed at her and Mr. McKay-Erskine violated his constitutional right to impeach a prosecution witness with evidence of bias

During trial, defense counsel moved to admit evidence that Ms. Erskine-McKay had threatened Mr. McKay-Erskine and his girlfriend, Camber Edwards. 10/14/13RP 44-46. Counsel said that Ms. Edwards would testify that, at around the time the charges were filed, Ms. Erskine-McKay said to her, "once I am done with the defendant, I am going to come after you." Id. Ms. Edwards took the threat seriously and petitioned the court for a restraining order against Ms. Erskine-McKay. Id. Counsel argued the evidence was admissible as evidence of bias under the state of mind exception to the hearsay rule, ER 803(a)(3). 10/14/13RP 45. The court disagreed and ruled the evidence was inadmissible hearsay. 10/14/13RP 46-47. The court's ruling was in error because the threat was not offered for the truth of the matter asserted but rather to show Ms. Erskine-McKay's state of mind. The

court's ruling violated Mr. McKay-Erskine's constitutional right to impeach a prosecution witness with evidence of bias.

A trial court's decision to admit or exclude evidence is generally reviewed for abuse of discretion. State v. Darden, 145 Wn.2d 612, 619, 41 P.3d 1189 (2002). A court necessarily abuses its discretion if it denies a criminal defendant's constitutional rights. State v. Iniguez, 167 Wn.2d 273, 280, 217 P.3d 768 (2009). The Court reviews a claim of denial of constitutional rights de novo. Id.

a. The court's ruling violated Mr. McKay-Erskine's constitutional right to impeach a prosecution witness with evidence of bias

A defendant's right to impeach a prosecution witness with evidence of bias is guaranteed by the constitutional right to confront witnesses. Davis v. Alaska, 415 U.S. 308, 316-18, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974); State v. Johnson, 90 Wn. App. 54, 69, 950 P.2d 981 (1998); U.S. Const. amend. VI; Const. art. I, § 22.

The constitutional right to confrontation encompasses the right to reveal the witness's possible biases, prejudices, or ulterior motives as they may relate directly to issues or personalities in the case at hand. Davis, 415 U.S. at 316. "The partiality of a witness is subject to exploration at trial, and is always relevant as discrediting the witness

and affecting the weight of his testimony." Id. (internal quotation marks and citation omitted).

It is fundamental that a defendant charged with the commission of a crime must be given great latitude to show the possible motives or biases of prosecution witnesses. State v. Spencer, 111 Wn. App. 401, 410, 45 P.3d 209 (2002). This is especially so in the prosecution of a sex crime because

> owing to natural instincts and laudable sentiments on the part of the jury, the usual circumstances of isolation of the parties involved at the commission of the offense and the understandable lack of objective corroborative evidence, the defendant is often disproportionately at the mercy of the complaining witness' testimony.

State v. Peterson, 2 Wn. App. 464, 466-67, 469 P.2d 980 (1970). A defendant has a right to confront the witnesses against him with evidence of bias so long as the evidence is at least minimally relevant. State v. Hudlow, 99 Wn.2d 1, 16, 659 P.2d 514 (1983).

Here, the trial court refused to allow Mr. McKay-Erskine to challenge the motives and biases of the complaining witness's mother by showing she had threatened him and his new girlfriend, Ms. Edwards. Ms. Erskine-McKay's statement to Ms. Edwards, "once I am done with the defendant, I am going to come after you," 10/14/13RP 44-46, was proper impeachment because it suggested Ms. Erskine-

Edwards was motivated in her testimony by a desire for revenge. The trial court's ruling that the evidence was inadmissible hearsay was erroneous because the statement was not offered for the truth of the matter asserted.

If a witness recounts a statement made by another witness to show bias on the part of the second witness, the statement is not objectionable as hearsay because it is not being offered to prove the truth of the matter asserted.[3] Spencer, 111 Wn. App. at 408-09. Instead, the statement is offered to show the second witness's mental state and therefore falls under an exception to the hearsay rule.[4] Id.

In Spencer, defense counsel moved to allow a witness to testify about statements allegedly made to her by another prosecution witness, demonstrating bias. Spencer, 111 Wn. App. at 405-06. According to the first witness, the second witness, who was the defendant's girlfriend, told her that the police threatened to take her to jail if she did

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[3] "Hearsay" is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence *to prove the truth of the matter asserted.*" ER 801(c) (emphasis added).

[4] The following kind of out-of-court statement is not excluded by the hearsay rule: "A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will." ER 803(a)(3).

not tell them what they wanted to hear, and that she was angry at the defendant because he had another girlfriend. Id. at 409. On appeal, the Court held the evidence was not inadmissible hearsay because it was not offered to prove that the police had actually threatened the witness. Id. Instead, the statement was admissible to show the witness's state of mind. Id.

As in Spencer, Ms. Erskine-McKay's statement to Ms. Edwards demonstrating a motive for revenge was not offered to prove the truth of the matter asserted but rather to show Ms. Erskine-McKay's state of mind. Thus, it was not inadmissible hearsay.

Moreover, the evidence was critical to Mr. McKay-Erskine's defense that the allegations were fabricated. A similar case is Peterson, 2 Wn. App. 464. In that case, a prosecution for indecent liberties against a child, the State's principal evidence was the story told by the complaining witness. Id. Defendant's theory was that the allegations were fabricated upon the instance of an older sister of the complainant. Id. at 465. At trial, he tried to establish this theory through cross-examination of the mother by suggesting the older daughter urged her to bring the charges. Id. at 465-66. But the trial court would not allow the cross-examination. Id. The Court reversed, holding

> the questions put to the mother upon cross-examination attempted to elicit testimony to establish an inference that the prosecution was initiated by the complaining witness for reasons which would tend to establish his innocence. Failure to permit the defendant reasonably to pursue a valid theory constituted error which seriously jeopardized his defense to a heinous crime.

Id. at 467. The evidence was particularly critical to Peterson's defense because the lack of corroborative evidence left Mr. Peterson "disproportionately at the mercy of the complaining witness' testimony." Id.

Similarly, here, due to nature of the case and the lack of corroborative evidence, Mr. McKay-Erskine was "disproportionately at the mercy of [A.B.'s] testimony" and hearsay allegations. Id. His defense was that the child was induced to fabricate the allegations by other people in the family. 9/26/13RP 7. It was therefore critical that he be allowed to challenge the motives and biases of the child's mother. Ms. Erskine-McKay's statement to Ms. Edwards demonstrated she was motivated by a desire for revenge against Mr. McKay-Erskine because he had cheated on her and assaulted her. Her statement, "once I am done with the defendant, I am going to come after you," 10/14/13RP 44-46, suggested her desire for revenge included coming after Mr. McKay-Erskine by raising these serious allegations. The trial court's

ruling precluding Mr. McKay-Erskine from eliciting relevant evidence that could have revealed the witness's possible motives and biases violated his constitutional right to confrontation. Davis, 415 U.S. at 316; Hudlow, 99 Wn.2d at 16.

b. The error requires reversal

Because a defendant has a constitutional right to impeach a prosecution witness with evidence of bias, any error in excluding such evidence is presumed prejudicial. Spencer, 111 Wn. App. at 408. Reversal is required unless no rational jury could have a reasonable doubt that the defendant would have been convicted even if the error had not taken place. Id.

In assessing whether the error was harmless, the Court may not "speculate as to whether the jury, as sole judge of the credibility of a witness, would have accepted this line of reasoning had counsel been permitted to fully present it." Davis, 415 U.S. at 317. Instead, the Court must conclude that "the jurors were entitled to have the benefit of the defense theory before them so that they could make an informed judgment as to the weight to place on [the witness's] testimony." Id.

As the mother of the complaining witness, Ms. Erskine-McKay was a crucial State witness. See Peterson, 2 Wn. App. at 465-67. Mr.

McKay-Erskine was entitled to wide latitude to explore her possible biases and motives. The evidence that was erroneously excluded suggested that, at the time the allegations arose, Ms. Erskine-McKay was strongly motivated by her desire for retribution against Mr. McKay-Erskine. It is likely that, had the jury heard the evidence, they would have been receptive to the suggestion that Ms. Erskine-McKay influenced the nature and content of her young daughter's allegations. The jury would likely have viewed the allegations with greater skepticism. Exclusion of the evidence was not harmless beyond a reasonable doubt.

3. Cumulative error denied Mr. McKay-Erskine a fair trial

Under the cumulative error doctrine, reversal is required when there have been several trial errors that standing alone may not be sufficient to justify reversal but when combined have denied a defendant a fair trial. See, e.g., State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); State v. Badda, 63 Wn.2d 176, 183, 385 P.2d 859 (1963) (three instructional errors and prosecutor's remarks during voir dire required reversal); State v. Alexander, 64 Wn. App. 147, 158, 822 P.2d 1250 (1992) (reversal required because (1) a witness impermissibly suggested victim's story was consistent and truthful, (2)

prosecutor impermissibly elicited defendant's identity from victim's mother, and (3) prosecutor repeatedly attempted to introduce inadmissible testimony during trial and in closing); State v. Whalon, 1 Wn. App. 785, 804, 464 P.2d 730 (1970) (reversing conviction because of (1) court's severe rebuke of defendant's attorney in presence of jury, (2) court's refusal of testimony of defendant's wife, and (3) jury listened to tape recording of lineup in absence of court and counsel).

Here, even if the above trial errors do not individually require reversal, when combined, they cumulatively denied Mr. McKay-Erskine a fair trial and reversal is therefore warranted.

4. Two of the conditions of community custody must be stricken because they are not statutorily authorized

The Sentencing Reform Act generally authorizes a trial court to impose crime-related prohibitions or affirmative conditions of community custody. RCW 9.94A.505(8); State v. Brooks, 142 Wn. App. 842, 850, 176 P.3d 549 (2008). A "crime-related" condition is one that "directly relates to the circumstances of the crime for which the offender has been convicted." RCW 9.94A.030(10).

Illegal or erroneous sentences may be challenged for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678

(2008). The Court generally reviews sentencing conditions for abuse of discretion. In re Pers. Restraint of Rainey, 168 Wn.2d 367, 374, 229 P.3d 686 (2010). A sentencing court abuses its discretion in imposing a crime-related condition if it applies the wrong legal standard. Id.

When a term included in a sentencing order is found to be improper, "[t]he simple remedy is to delete the questionable provision from the order." State v. Riles, 135 Wn.2d 326, 350, 957 P.2d 65 (1998), abrogated on other grounds by State v. Valencia, 169 Wn.2d 782, 239 P.3d 1059 (2010).

a. The condition forbidding Mr. McKay-Erskine from having contact with "physically or mentally vulnerable" individuals is not crime-related

The court entered the following condition of community custody: "Do not have any contact with physically or mentally vulnerable individuals." CP 125. This condition is not crime-related because the circumstances of the crime did not involve physically or mentally vulnerable individuals.

In Riles, Petitioner Gholston was convicted of first degree rape for raping a nineteen-year-old woman. Riles, 135 Wn.2d at 336. As a condition of community custody, the trial court ordered that he not have contact with any minor-age children without the approval of his

community corrections officer or mental health treatment counselor. Id. at 337. The Supreme Court struck the condition because "[t]here [wa]s no reasonable relationship between his crime and the order prohibiting his contact with minors." Id. at 349. Although the statute gives courts authority to order offenders not to have contact with "a specified class of individuals," RCW 9.94A.703(3)(b), the "specified class of individuals" must have some relationship to the crime. Riles, 135 Wn.2d at 350. Because Gholston was convicted of raping an adult woman, he could not be barred from having contact with children. Id.

Here, Mr. McKay-Erskine was convicted of crimes committed against a child who had no apparent physical or mental vulnerabilities. Thus, the condition barring him from having contact with any "physically or mentally vulnerable individuals" is not related to the circumstances of the crime. It is therefore not statutorily authorized and must be stricken. Id.

b. The condition requiring Mr. McKay-Erskine to obtain a substance abuse evaluation and a mental health evaluation is not crime-related

Another condition of community custody requires Mr. McKay-Erskine to "[o]btain a Substance Abuse Evaluation, a Mental Health Evaluation, . . . and comply with any/all treatment recommendations."

CP 126. This condition was also not authorized because it was not crime-related.

A condition of community custody requiring the offender to participate in alcohol or drug counseling must be "crime-related." RCW 9.94A.703(3); State v. Jones, 118 Wn. App. 199, 207-08, 76 P.3d 258 (2003); State v. Parramore, 53 Wn. App. 527, 529, 768 P.2d 530 (1989). To justify such a condition, the evidence must show and the court must find that alcohol or drugs contributed to the crime. Jones, 118 Wn. App. at 203, 208. Alcohol or drug counseling "'reasonably relates' to the offender's risk of reoffending, and to the safety of the community, only if the evidence shows that alcohol [or drugs] contributed to the offense." Id. at 208.

Here, there was no evidence presented that drugs or alcohol contributed to the offense and the trial court did not make such a finding. Therefore, the condition requiring a substance abuse evaluation was not crime-related and must be stricken.

As for the condition requiring a mental health evaluation, it is also not authorized because it is not crime-related. A trial court may impose a condition of community custody requiring affirmative conduct only if it is "crime-related." RCW 9.94A.505(8). Also, any

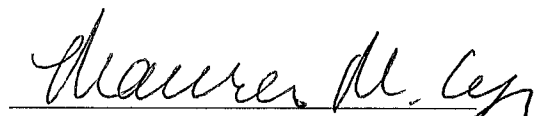
requirement that the offender participate in treatment or counseling services must be "crime-related." RCW 9.94A.703(3)(c).

Here, there was no evidence presented or trial court finding that Mr. McKay-Erskine suffered from a mental health condition that contributed to the circumstances of the crime. Therefore, the condition requiring a mental health evaluation is not "crime-related" and must be stricken.

F. CONCLUSION

The trial court erroneously admitted propensity evidence in violation of ER 404(b) and unreasonably restricted Mr. McKay-Erskine's constitutional right to present evidence of the bias and motive of a key prosecution witness. Together these errors deprived Mr. McKay-Erskine of a fair trial and require reversal of the convictions. Also, two conditions of community custody must be stricken because they are not statutorily authorized.

Respectfully submitted this 23rd day of June, 2014.



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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON, Respondent, v. ROBERT MCKAY-ERSKINE, Appellant.	)))))))))	NO. 45587-1-II

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